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In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED PARCEL SERVICE, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the National Labor Relations Board's decision that employees who had historically been excluded from a collective bargaining unit could not be accreted to that unit without a showing of majority support for the union.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Color Tech. Corp., 286 N.L.R.B. 476 (1987)	12
Gould, Inc., 263 N.L.R.B. 442 (1982)	4, 8
International Assoc. of Machinists v. *NLRB*, 759 F.2d 1477 (9th Cir. 1985)	11
International Ladies' Garment Workers' Union v. *NLRB*, 366 U.S. 731 (1961)	7
King Radio Corp., 257 N.L.R.B. 521 (1981)	5, 8
Laconia Shoe Co., 215 N.L.R.B. 573 (1974)	4, 5, 8
Local Lodge No. 1424, Int'l Assoc. of Machinists v. *NLRB*, 362 U.S. 411 (1960)	7
NLRB v. *Baptist Hospital, Inc.*, 442 U.S. 773 (1979)	9
NLRB v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990)	9
NLRB v. *Stevens Ford, Inc.*, 773 F.2d 468 (2d Cir. 1985)	9
Sterilon Corp., 147 N.L.R.B. 219 (1964)	8
United States Steel Corp., 280 N.L.R.B. 837 (1986)	12

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 7, 29 U.S.C. 157	7, 8, 11
§ 8(a)(1), 29 U.S.C. 158(a)(1)	3, 7
§ 8(a)(2), 29 U.S.C. 158(a)(2)	3, 7
§ 8(a)(3), 29 U.S.C. 158(a)(3)	3, 7
§ 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A)	3, 7, 8

Statute —Continued: Page

§ 8(b)(2), 29 U.S.C. 158(b)(2) 3, 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 17 F.3d 1518. The decision and order of the National Labor Relations Board (Pet. App. 14a-29a), together with the decision of the administrative law judge (Pet. App. 30a-51a), is reported at 312 N.L.R.B. 595.

JURISDICTION

The judgment of the court of appeals (Pet. App. 55a-56a) was entered on March 25, 1994. The petition for rehearing was denied on July 20, 1994. Pet. App. 54a. The petition for a writ of certiorari was filed on

September 23, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner United Parcel Service, Inc. (UPS) is engaged in the interstate transportation and distribution of parcels. Pet. App. 32a, 15a. The operations clerks, who are the subject of this dispute, process packages that UPS transports for delivery to customers. *Id.* at 37a, 15a n.3. Prior to 1979, approximately 220 locals of the International Brotherhood of Teamsters (Union) had individual bargaining relationships with various UPS facilities. *Id.* at 15a, 33a. Some of these bargaining units included operations clerks; others did not. *Id.* at 15a. Approximately 40% of the operations clerks were not covered by the local agreements. *Id.* at 16a.

In 1979, UPS recognized a single nationwide bargaining unit represented by the Union, into which the various separate geographical units were merged. UPS and the Union, representing the local unions, conducted national negotiations for a new collective-bargaining agreement. Pet. App. 16a, 33a.

The parties' first collective-bargaining agreement was effective from 1979 to 1982. Pet. App. 16a, 34a. That agreement covered various classifications of employees, including operations clerks "where already recognized." *Ibid.* Although the Union contended that the agreement should cover all operations clerks, in practice it covered only those employees who had been represented by the locals under the individual agreements. *Id.* at 16a, 35a. In 1982, over the objections of the Union, the parties entered into a new agreement. That agreement was initially effective until 1985 and was subsequently extended until 1987. The previously unrepresented operations clerks remained uncovered. *Id.* at 16a, 36a.

In 1987, UPS accepted the Union's proposal to include all operations clerks in the bargaining unit for a new agreement, to be effective August 1, 1987, through July 21, 1990. Pet. App. 36a. The duties of the operations clerks remained unchanged. *Id.* at 16a-17a. The 1987 agreement contained a union security clause requiring employees to pay union dues and initiation fees as a condition of employment. *Id.* at 16a, 37a. Some previously unrepresented operations clerks completed dues checkoff authorizations; UPS deducted the dues and fees, and transmitted the funds to the Union, which accepted them. *Id.* at 37a. The Union did not provide any evidence that it was supported by a majority of the previously excluded clerks, and UPS did not ask for any. *Id.* at 17a, 36a n.9.

2. a. In 1989 the General Counsel of the National Labor Relations Board (Board) issued a consolidated complaint and an amended complaint. The General Counsel alleged, *inter alia*, that UPS had violated Section 8(a)(1), (2), and (3) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), (2), and (3), by recognizing the Union as the collective bargaining representative of previously unrepresented operations clerks when a majority of those employees had not designated the Union as their representative, and by tendering to the Union dues deducted from the pay of these employees pursuant to the union security clause. The General Counsel also alleged that the Union had violated Section 8(b)(1)(A) and (2) of the Act, 29 U.S.C. 158(b)(1)(A) and (2), by receiving dues deducted from the pay of previously unrepresented operations clerks at a time when the Union did not represent a majority of those clerks and by causing UPS to discriminate against certain of them. Pet. App. 31a-32a.

After a hearing, an administrative law judge (ALJ) dismissed the complaint. Pet. App. 51a. The ALJ rejected the General Counsel's contention that because the operation clerks had been excluded from the unit under prior bargaining agreements, they could not be accreted to the existing unit in the absence of an election or showing of majority support. *Id.* at 41a, 44a-51a. The ALJ concluded that the clerks could lawfully be accreted to the existing unit because of their community of interest with the other clerks in that unit. In the ALJ's view, the clerks' prior exclusion from the unit did not bar accretion because the Union had not acquiesced in their exclusion. *Id.* at 46a-51a.

b. The Board reversed. Pet. App. 14a-29a. It concluded that UPS had violated the Act by recognizing the Union, and by deducting dues from the pay of the previously unrepresented employees and transmitting the money to the Union. It held as well that the Union had violated the Act by accepting recognition and accepting the dues. The Board explained that accretion to an existing bargaining unit is permitted only

> where *new groups of employees* have come into existence after a union's recognition or certification or during the term of a collective-bargaining agreement. If the new employees have such common interests with members of an existing bargaining unit that the new employees would, if present earlier, have been included in the unit * * *, the Board will permit accretion.

Id. at 18a (citing *Gould, Inc.*, 263 N.L.R.B. 442, 445 (1982)). Citing *Laconia Shoe Co.*, 215 N.L.R.B. 573, 576 (1974), the Board concluded that the previously unrepresented clerks could not lawfully be accreted to the existing unit because the parties had failed to include

that group of employees in the earlier collective bargaining agreements. Pet. App. 17a.[1]

The Board also disagreed with the ALJ's conclusion that accretion is foreclosed only when the union has acquiesced in employees' exclusion from the bargaining unit. "It is the fact of historical exclusion," the Board held, rather than the union's acquiescence, "that is determinative." Pet. App. 19a (emphasis omitted). The Board further found, however, that in any event the Union had acquiesced in the prior exclusion of the operations clerks. In successive bargaining agreements the group had been excluded, and during earlier negotiations the Union had consciously abandoned a proposal that would have included the disputed employees. *Id.* at 19a & n.5 (citing *King Radio Corp.*, 257 N.L.R.B. 521, 526 (1981)).

The Board further stated that UPS had acted unlawfully in recognizing the Union. It observed that "the Employer did not ask for and the Union did not proffer proof of majority support for the Union in the group of previously unrepresented employees. An official of the Union testified about his belief that the Union had majority support in this group, but he admitted that he had no 'papers,' including authorization cards, to support this belief." Pet. App. 17a.

To remedy the violations found, the Board ordered UPS to withdraw recognition from the Union as the representative of the employees in question, and to cease applying the terms of the 1987 agreement to those

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[1] In *Laconia Shoe Co.*, 215 N.L.R.B. 573, 576 (1974), the Board held that the primary consideration in accretion cases is "whether the group sought to be accreted has been in existence at the time of recognition or certification, yet not covered in an ensuing contract."

employees until the Union was certified by the Board as their representative. The Board also ordered the Union and UPS to reimburse the previously unrepresented clerks for dues and fees unlawfully exacted. Pet. App. 21a.

3. The court of appeals enforced the Board's order. Pet. App. 1a-13a. The court found that the Board had "properly applied its prior decisions to conclude that the unrepresented clerks employed by [UPS] could not lawfully be accreted to the existing bargaining unit without a showing of majority support among them for the Union and that the Union did not in fact enjoy majority support among them." *Id.* at 13a.

The court agreed with the Board that the decision in *Laconia Shoe* was controlling, and that the clerks' "historical exclusion * * * is determinative" when accretion is urged in the absence of a showing that the majority of the employees in question wish to be represented. Pet. App. 5a. The court also agreed that the Union's prior acquiescence in the clerks' exclusion was not relevant. *Id.* at 7a-9a. The court also noted that, even if acquiescence were a relevant factor, the Union here had "twice agreed" to the exclusion of those employees from the bargaining unit. *Id.* at 8a. Because the disputed employees could not be accreted to the unit, the court upheld the Board's conclusion that the Union could not represent the previously unrepresented clerks without a showing of majority support. *Id.* at 9a.

Finally, the court agreed that the General Counsel had met his burden of showing that the Union did not enjoy majority support among the disputed employees. In the court's view, "it is reasonable for the Board to presume that, absent some indication to the contrary, the majority of a group that has historically been excluded from a bargaining unit does not support the union that

represents that unit." Pet. App. 13a. Because UPS and the Union had "utterly failed" to rebut that presumption, the court stated, "the Board properly concluded that the Union lacked the necessary majority support." *Ibid.*

ARGUMENT

The court of appeals correctly applied established legal principles to the facts of this case. Its decision is not in conflict with decisions of this Court or of any other court of appeals. Further review is therefore not warranted.

1. It is well settled that an employer violates Section 8(a)(2) and (1) of the Act, 29 U.S.C. 158(a)(2) and (1), by recognizing, as the exclusive bargaining representative, a union that does not represent a majority of unit employees. *International Ladies' Garment Workers' Union* v. *NLRB (Bernhard-Altmann)*, 366 U.S. 731, 737-738 (1961). A union that lacks the support of a majority of the unit employees violates Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), by accepting such recognition. Where an employer and a minority union enter into and enforce a contract containing a union security provision, the employer violates Section 8(a)(3) and (1), 29 U.S.C. 158(a)(3) and (1), and the union violates Section 8(b)(2) and (1)(A) of the Act, 29 U.S.C. 158(b)(2) and (1)(A).[2] *Local Lodge No. 1424, Int'l Assoc. of Machinists* v. *NLRB*, 362 U.S. 411, 412-414 (1960).

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[2] Section 8(a)(2) of the Act makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. Section 8(a)(3) makes it an unfair labor practice for an employer to enter into a union-security agreement with a union that does not

Before the Board and the court of appeals, petitioners contended that the operations clerks could be accreted to the existing bargaining unit, thus rendering unnecessary any direct inquiry into the level of support for the Union within that group of workers. In determining whether new employees may properly be accreted or added to an existing bargaining unit, the Board generally applies a community of interest test. That test involves an examination and balancing of such factors as "integration of operations, centralization of managerial and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control of labor relations, collective-bargaining history, and interchange of employees." *Gould, Inc.*, 263 N.L.R.B. 442, 445 (1982). In the present case, however, the Board found the community of interest test inapposite. It instead applied the rule that "[w]hen a group [of employees] has in fact been excluded for a significant period of time from an existing * * * unit, the Board will not permit their accretion without an election or a showing of majority [support] among them." *Laconia Shoe Co.*, 215 N.L.R.B. 573, 576 (1974); see Pet. App. 18a-19a. Accord *King Radio Corp.*, 257 N.L.R.B. 521, 526 (1981); *Sterilon Corp.*, 147 N.L.R.B. 219, 221 (1964). The court of appeals correctly concluded that "the *Laconia Shoe* doctrine is critical to the protection of employees' Section 7 right to choose whether to

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represent a majority of the employees in the bargaining unit. Section 8(b)(1)(A) makes it an unfair labor practice for a union "to restrain or coerce employees in the exercise of the rights guaranteed in [S]ection 7." Section 7, 29 U.S.C. 157, protects "the right to self-organization, to form, join, or assist labor organizations, * * * and shall also have the right to refrain from any or all such activities."

belong to a union and if so to which one." Pet. App. 6a. As the Second Circuit explained in *NLRB* v. *Stevens Ford, Inc.*, 773 F.2d 468, 474 (1985), "[i]f groups of employees may be permissibly accreted to a bargaining unit after they have been earlier excluded from an election in that unit, strategic selection of one group for election purposes followed by accretion will lead to a larger bargaining unit in which the bargaining representative does not have majority status."

2. Contrary to petitioners' contention (Pet. 7-11), the court of appeals' decision is fully consistent with this Court's holding that a presumption must "rest on a sound factual connection between the proved and inferred facts," and that its validity depends upon the existence of a rational nexus between what is proved and what is inferred. *NLRB* v. *Baptist Hospital, Inc.*, 442 U.S. 773, 787 (1979). As the court of appeals explained, "[b]y showing that the disputed clerks had historically been excluded from the Teamsters Union, the General Counsel cast substantial doubt upon the Union's majority status among them." Pet. App. 12a. Because of this doubt, "which is founded upon fact and is thus 'more than conjecture,'" it is "reasonable for the Board to presume that, absent some indication to the contrary, the majority of a group that has historically been excluded from a bargaining unit does not support the union that represents that unit." *Id.* at 12a-13a.

NLRB v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990), is not to the contrary. In that case the Court upheld the Board's ruling that no presumption is warranted as to the union sentiments of replacement workers who crossed a picket line during a strike. The striker replacements in *Curtin Matheson* had voluntarily joined a bargaining unit represented by a union. Here, by contrast, UPS and the Union have long agreed

to exclude the employees in question from the benefits of representation. The Board's conclusion that these employees should be presumed not to support the Union is in no way inconsistent with its views concerning the likely preferences of striker replacements.

3. Similarly without merit is petitioners' related contention (Pet. 11-14) that the court of appeals' decision absolves the General Counsel of his burden to prove a lack of majority status. As the court of appeals pointed out, the General Counsel's burden of proof "should be sensitively calibrated * * * to the context in which it must be carried—in this case, a context formed by the doctrines of accretion and historical exclusion." Pet. App. 11a. Given the Board's "statement of the substantive law"—namely, that an accretion without an election or a showing of majority support among the disputed employees will not be permitted where they have been excluded for a significant period of time from an existing unit—the court correctly concluded that the General Counsel could not "be expected to prove more, in his prima facie case against accretion, than the fact that the employees in question were historically excluded from the putative bargaining unit." *Ibid.* While it was open to the Union to rebut the General Counsel's prima facie case by producing some reliable evidence of its majority status, it failed to do so.[3]

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[3] Prior to prosecuting the complaint in this case, the General Counsel subpoenaed all documentary evidence showing that the disputed clerks had designated the Union as their bargaining representative. The Union produced nothing in response. At the administrative hearing, a union official confirmed that he had "no records or papers to verify that." Pet. App. 11a. Instead, he testified that he believed that the Union had majority status solely on the basis of conversations he had had with some of the clerks in question.

4. Petitioners also contend (Pet. 14-16) that the court of appeals' decision subverts the operation of the Act by frustrating the goal of industrial peace. Under the statute, however, the preservation of employee free choice is of no less importance than is the encouragement of collective bargaining. *International Assoc. of Machinists* v. *NLRB*, 759 F.2d 1477, 1479 (9th Cir. 1985). As the Board explained (Pet. App. 18a), accretion is permitted only in limited circumstances because accretion denies employees the opportunity to select their bargaining representative.[4] The task of fashioning an appropriate balance between competing statutory policies is substantially entrusted to the Board, and the court of appeals correctly declined to disturb that balance.

5. Finally, there is no merit to petitioners' contention (Pet. 16-18) that the Board has departed from its established precedent without supplying a reasoned basis for that change. The court of appeals, after a careful analysis of the relevant precedents (Pet. App. 4a-9a), correctly concluded that the ruling here is fully consistent with the Board's prior decisions. There is, in particular, no basis for petitioners' contention (Pet. 17-

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Petitioners note (Pet. 11) that only one employee out of several thousand affected employees filed an unfair labor practice charge with the Board complaining about being accreted to the union-represented unit. However, the number of employees who choose to file a charge is not relevant to the determination whether the union enjoys majority support. Some employees may be reluctant to protest publicly a decision reached by a large employer and a large union; others may be content to let someone else act as their leader.

[4] The mere fact that the employer and the Union had reached an agreement to include the disputed employees (Pet. 14 n.2) cannot override the employees' Section 7 rights.

18) that *United States Steel Corp.*, 280 N.L.R.B. 837 (1986), is inconsistent with the decision in this case. *United States Steel* did not present the question whether employees that had historically been excluded from an existing bargaining unit should be accreted to that unit. See *id.* at 837 n.2. That situation is governed by the *Laconia Shoe* doctrine, and nothing in *United States Steel* indicates an intent to overrule that doctrine.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Indeed, subsequent to *United States Steel*, the Board has continued to apply the *Laconia Shoe* doctrine in appropriate circumstances. See *Color Tech Corp.*, 286 N.L.R.B. 476, 487 (1987).